

Cartel Regulation

Getting the fine down
in 42 jurisdictions worldwide

2010

Contributing editor: Martin Low QC



Published by
GETTING THE DEAL THROUGH

in association with:

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Cartel Regulation 2010

Published by
 Law Business Research Ltd
 87 Lancaster Road
 London, W11 1QQ, UK
 Tel: +44 20 7908 1188
 Fax: +44 20 7229 6910
 © Law Business Research Ltd
 2010

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ISSN 1473-3420

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Printed and distributed by
 Encompass Print Solutions.
 Tel: 0870 897 3239

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Argentina

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Legislation and jurisdiction

1 Relevant legislation

What is the relevant legislation and who enforces it?

The antitrust legislation governing cartel regulation is primarily embodied in the National Antitrust Law No. 25,156, enacted in September 1999 (the Law), as later regulated by Presidential Decree No. 89/2001 (together, the Antitrust Law). The Antitrust Law contains all the general provisions regarding competition matters, including merger control and unilateral and multilateral anti-competitive conduct, including but not limited to, cartels.

The Antitrust Law provides for the creation of a new antitrust enforcement body, the National Tribunal for the Defence of Competition (the TNDC). The TNDC is intended to be a decentralised body of the federal administration, fully independent both in decision-making and enforcement, formed by seven members appointed by the president of Argentina following a public competitive selection process. Despite the time that has elapsed since the enactment of the Law, the constitution of the TNDC is still pending and long past due. As a result, antitrust enforcement continues to be vested with the antitrust authorities predating the Law as permitted by temporary provisions of the Law, namely, the National Commission for the Defence of Competition (the CNDC) and the Trade Secretariat of the National Ministry of Economy and Production (the Secretariat).

Five members constitute the CNDC: a president and four commissioners. Commissioners are appointed for a four-year term. Two commissioners must be lawyers and the other two economists. The CNDC president is a political appointee of the Argentinian president, designated without a fixed term. At present, the president is a lawyer and former judge, and there are only three commissioners, two lawyers and one economist; the remaining place for an economist commissioner is currently vacant.

The CNDC carries out investigations at the request of a party or ex officio and submits non-binding recommendations to the Secretariat, ultimately in charge of enacting final administrative antitrust rulings, subject to appeal before the judicial courts. In the vast majority of cases, the CNDC's recommendations are endorsed by the Secretariat.

In 2008, the Federal Supreme Court of Justice confirmed that until the TNDC is appointed, the antitrust authority remains two-tiered, comprising the CNDC, with instruction and advisory powers, and the Secretariat, with decision-making powers.

2 Proposals for change

Have there been any recent changes or proposals for change to the regime?

At present, a team of CNDC staff is working on a proposal for the incorporation of a leniency programme into the Law. Recently, a draft

of such proposal was circulated among practitioners for comments. The draft only contains a partial amendment in order to incorporate such programme into the Law.

3 Substantive law

What is the substantive law on cartels in the jurisdiction?

Article 1 of the Law forbids actions or practices that have as their object or effect the limitation, restriction, falsification or distortion of competition or the access to the market in a way that may result in damage to the general economic interest. Article 2 of the Law contains a non-exhaustive list of 14 prohibited practices, including several concerted actions such as price fixing, quantity fixing, horizontal allocation of territories, markets, customers or supply sources, bid rigging, horizontal agreements to restrict investments and horizontal agreements to restrict research and development. The Law does not forbid any anti-competitive practice per se; it is considered that all practices are subject to a rule-of-reason analysis. This means that practices included in article 2 will only be considered illicit if they fall under the general prohibition of article 1, namely, if they are anti-competitive and able to damage the general economic interest. The Supreme Court has confirmed that the infringement does not require effective damage to the general economic interest since the mere 'danger of damage' suffices to make the conduct illegal.

Even if the general economic interest is an element of the illicit conduct, the Law does not provide a definition of this concept. The interpretation of this notion by the CNDC and the courts has varied from time to time, though during the past few years it has been associated with economic efficiency, 'total surplus' and more recently, 'consumer surplus'.

The Law differs from previous antitrust legislation (Law No. 22,262) in that it explicitly forbids practices with an anti-competitive object. This means that certain practices could be illegal for restricting competition by its object, regardless of whether they can also be proven to have restrictive effects. While cartels may fall under this concept, the CNDC has not yet fully developed this notion in recommendations or decisions. However, it should be noted that in some alleged cartel cases, the CNDC has affirmed that hard-core cartels restrict competition in such a way that the only possible effects are efficiency distortion and damage to the general welfare, as they trigger price rises and output restriction.

4 Industry-specific offences and defences

Are there any industry-specific offences and defences?

The Antitrust Law does not provide for any industry-specific offence or defence and there are no exceptions in the Law for any specific industry. During the congressional debate prior to the enactment of

the Law, a proposal for the incorporation of specific provisions for the media industry was discussed but eventually rejected.

5 Application of the law

Does the law apply to individuals or corporations or both?

The Law applies to both corporations and individuals. In case of legal entities, fines may be applied jointly to the legal entities and to the members of the administration body (board of directors or directores, managers or administrators), syndics or members of the Surveillance Office (Consejo de Vigilancia), attorneys and legal representatives that contributed, encouraged or permitted the infringement. At the time of writing, no individual has yet been fined for any cartel conduct under the Law, but some individual actions against directors and managers of companies are currently in progress.

6 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction?

Article 3 of the Law establishes that the regime applies to individuals and legal entities that perform activities outside the national jurisdiction as long as their activities or agreements produce effects in Argentina.

To date the Law has been applied extraterritorially only in certain merger control cases. Such application has been extended neither to cartel cases nor to any other conduct that had taken place outside Argentina.

Investigation

7 Steps in an investigation

What are the typical steps in an investigation?

Investigations may be triggered either by third parties filing a complaint (typically a supplier, a consumer or a competitor) or by the CNDC launching an inquiry on its own initiative. There are no formalities for the submission of complaints, but the filing party must afterwards ratify the complaint at the CNDC. At present, as the Law does not provide for a leniency programme, no filings by whistleblowers are specially considered.

In cartel cases, the CNDC frequently performs raids in order to collect evidence before taking any further action. Afterwards, the CNDC informs the parties involved that an investigation has been opened and grants them a 10-day period to submit 'explanations' for their alleged illegal conduct. Where the CNDC considers that there are enough grounds for the application of sanctions, a resolution with charges is issued. In such case, defendants have a 15-day period to submit defences and to offer evidence. The Antitrust Law stipulates a 180-day period for the production of all evidence and a 60-day period for issuing a final resolution. This final resolution is subject to appeal before the judicial courts. During the investigation, the CNDC may issue injunctions ordering parties to cease the conduct under investigation.

In practice, the time periods provided in the Law are generally exceeded by both the CNDC and the Secretariat. It should be noted that the number of CNDC personnel has not increased significantly since the implementation of the mandatory merger control filing procedure, despite the fact that most of the CNDC resources and staff are dedicated to such procedure. It is worth noting, however, that a Conduct Division, separated from a Merger Division, has recently been created within the CNDC. It is expected that this new body will help to reduce conduct investigation periods.

8 Investigative powers of the authorities

What investigative powers do the authorities have?

The CNDC has broad investigative powers. It may request the judiciary issue a search warrant allowing it to enter premises and seize materials, including electronic data. Once a request has been filed with the court, a warrant has to be granted or rejected within 24 hours.

During the raid, CNDC members often receive support from technical police units that provide assistance in the search for electronically stored information. Dawn raids usually take place simultaneously on alleged members of the cartel and sometimes on relevant sector associations. This power is commonly used by the CNDC as it has proved to be an efficient means of gathering evidence.

The CNDC may also issue information requests to parties under investigation and to third parties, such as competitors, suppliers, customers, industry experts or associations. Any such parties are compelled to provide the requested information and failure to meet such requests might be subject to daily fines.

The antitrust authorities also have the power to take statements from investigation subjects and from third parties (complainants, injured parties, expert witnesses, competitors, suppliers, etc) who can be compelled by public force to attend depositions when they are summoned. Giving false testimony is considered a crime.

International cooperation

9 Inter-agency cooperation

Is there inter-agency cooperation? If so, what is the legal basis for, and extent of, cooperation?

Within the scope of Mercosur, Argentina signed in 2004 an understanding on cooperation between the antitrust authorities of the member states of Mercosur for the application of their national antitrust laws. The purpose of this agreement is to promote cooperation between enforcement authorities of each member state in antitrust matters. The agreement seeks to ensure that member states guarantee careful consideration of their reciprocal interest in the enforcement of their antitrust laws and includes technical cooperation between member countries.

Argentina has also signed a bilateral agreement with Brazil with similar scope that was sent to Congress last July for ratification by law. In practice, the Brazilian and Argentinian antitrust authorities maintain fluid communications as they cooperate with each other by means of exchange of market information and informal discussions about market definition, especially in merger cases. The CNDC also cooperates informally with the Chilean antitrust authorities, notwithstanding the fact that no formal agreement providing for such cooperation has been signed.

The CNDC is also a member of the International Competition Network (ICN) and receives informal assistance from other agencies such as the EU authorities and the US Department of Justice. Both the EU authorities and the US Department of Justice are collaborating and making recommendations on the draft leniency programme.

10 Interplay between jurisdictions

How does the interplay between jurisdictions affect the investigation, prosecution and punishment of cartel activity in the jurisdiction?

To date, interplay between jurisdictions has been restricted to cooperation in merger cases. On one occasion, Argentinian authorities provided foreign authorities information regarding a cartel case. The CNDC has no record of information submitted by other jurisdictions regarding cartel cases.

11 Adjudication

How is a cartel matter adjudicated?

The CNDC both investigates and adjudicates by submitting a non-binding recommendation regarding the case to the Secretariat. Recommendations issued by the CNDC are usually confirmed by the Secretariat. When the TNDC is constituted, the investigative and adjudicatory powers will remain concentrated within such tribunal.

12 Appeal process

What is the appeal process?

The Antitrust Law provides that decisions imposing fines, issuing remedial orders, denying or qualifying mergers or dismissing complaints may be appealed before the federal courts. Other CNDC decisions that are not explicitly mentioned in the Antitrust Law as subject to appeal may also be appealed, as the Supreme Court has established that all administrative decisions are subject to judicial review.

There have been uncertainties arising from the Decree as to whether the federal civil and commercial courts are the proper venues to hear appeal cases as opposed to the federal economic criminal courts, with contradictory court rulings on the subject. Absent a final mandatory ruling for all courts, the matter remains unresolved.

13 Burden of proof

With which party is the burden of proof?

The burden of proof lies with the CNDC. The lack of a leniency programme makes it more difficult for the authority to adequately prove the existence of a cartel. In practice, once a collusive agreement has been sufficiently proved, the CNDC tends to consider it illegal despite the fact that no types of conduct are considered illegal under the Law. According to the CNDC, the rationale of this argument lies in the fact that because the collusive agreement has the object or effect of increasing prices or limiting output, the harm to the general economic interest can be inferred.

Sanctions**14 Criminal sanctions**

What criminal sanctions are there for cartel activity? Are there maximum and minimum sanctions?

As the Antitrust Law does not provide for imprisonment, criminal sanctions for cartel activity are limited to fines, ranging from 10,000 pesos to 150 million pesos.

The former antitrust law contained a different set of criminal sanctions that contemplated a special judicial procedure including prison sanctions for some antitrust offences (mainly cartels) and different minimum and maximum fines (the former law provided for a maximum possible fine of either up to 500,000 pesos or up to 20 per cent of the total benefit illicitly obtained). However, during the application of such regime, prison sanctions were never imposed.

As some investigations initiated under the former antitrust law are still in progress, fines of up to 20 per cent of the illicit gain may still be applicable.

15 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Under the Antitrust Law, administrative sanctions for illegal antitrust practices (including cartels) consist of cease-and-desist orders and, if relevant, removal of the effects of the conduct. Corporations and individuals involved in the antitrust practice may be also banned from engaging in acts of commerce for a period ranging from one to 10 years.

In a case of an abuse of a dominant position or when the acquisition or consolidation of an illegal monopoly or oligopoly is verified, the Antitrust Law also allows the antitrust authorities to order measures aimed at neutralising the distorting aspects of such conduct on competition, or to request that a judge issue an order for the dissolution, liquidation, demerger or division of the companies involved in such practices.

16 Civil and administrative sanctions

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Conduct involving cartel activity may be subject to both administrative and criminal sanctions. It is a common practice for the CNDC to issue a cease-and-desist order and to impose a fine in cartel cases.

17 Private damage claims and class actions

Are private damage claims or class actions possible?

Private damages may be claimed in ordinary courts (as opposed to federal courts). The former antitrust law required prior intervention of the antitrust authority before any private claim could be filed. The Antitrust Law eliminated such a prerequisite, and therefore damages may now be claimed without prior intervention of antitrust authorities. Despite the simplification of the procedure, damages claims for antitrust practices are not yet common practice in Argentina.

In September 2009, the first court ruling regarding private damages claims was issued. The case concerned an exploitative abuse of a dominant position in the liquid petroleum gas market. As yet, there is no record of rulings on private damages claims regarding cartels.

No special provisions for class actions have been included in the Antitrust Law, and at the time of writing, there is no record of class action antitrust litigation.

18 Recent fines and penalties

What recent fines or other penalties are noteworthy? What is the history of fines? How many times have fines been levied? What is the maximum fine possible and how are fines calculated? What is the history of criminal sanctions against individuals?

The track record on the application of fines is still modest. In the past 10 years, less than 20 practices have been sanctioned by fines, including cartels and other practices such as abuses of dominant position. Recently, the CNDC has intensified its fight against cartels, imposing two significant fine sanctions in both the cement and medical oxygen markets.

The cement case was opened during 1999 under the former antitrust law, and per its applicable provisions, the parties were subject to a maximum possible fine of either up to 500,000 pesos or up to 20 per cent of the illicit gain. Until this ruling, the CNDC had always applied the 500,000 peso maximum fine unless the illicit gain could actually be measured. In the cement case, the CNDC changed such criteria by using assumptions to estimate the illicit gain of the infringing companies, which led to the application of one of the highest fines in Argentinian antitrust history: a fine of approximately 310 million pesos was imposed on the cement companies and the association encompassing them. This fine was ratified by the federal court in August 2008, but the decision is still under review.

The other remarkable investigation involved the medical oxygen market and was initiated under the Antitrust Law, which stipulates that fines may range from 10,000 pesos to 150 million pesos. A fine

of approximately 70 million pesos was applied to members of the cartel, but this decision is still under judicial review.

Recently, a fine concerning allegations of market allocation in the liquid petroleum gas market was revoked by the federal court on the grounds that the investigation had failed to adequately prove the existence of the practice.

As indicated in question 5, no fines have yet been imposed on individuals.

Sanctions

19 Sentencing guidelines

Do sentencing guidelines exist?

The Antitrust Law establishes that fines must be determined on the basis of the losses suffered by persons affected by the illegal practice, the benefit obtained by the infractors, and the value of their assets. In case of second offences, fines are doubled.

For the purpose of setting fines, the authorities must also take into account the significance (materiality) of the infraction, the damage caused, the indication of intent, the infractors' market share, the affected market size, the duration of the practice, as well as the background and economic capacity of the infractors.

Along with the leniency draft, the CNDC is working on certain sentencing guidelines in order to provide for more certainty and transparency in the application of the proposed leniency programmes. Such sentencing guidelines could reduce any possible arbitrary criteria related to the reduction of fines by operation of the forthcoming leniency programme.

20 Sentencing guidelines and the adjudicator

Are sentencing guidelines binding on the adjudicator?

At the time of writing, no sentencing guidelines have been issued and so the antitrust authority must in all cases follow the principles set out in the Antitrust Law. The broad scope of such rules gives the authority a wide range of discretion. However, the maximum applicable amount for fines – 150 million pesos – may not be exceeded.

21 Leniency and immunity programmes

Is there a leniency or immunity programme?

There is neither a leniency programme nor an immunity programme in Argentina. As previously stated, a draft providing a legal reform regarding a leniency programme has been recently circulated among practitioners, but is not yet being debated in Congress.

22 Elements of a leniency or immunity programme

What are the basic elements of a leniency or immunity programme?

Not applicable.

23 First in

What is the importance of being 'first in' to cooperate?

Not applicable.

24 Going in second

What is the importance of going in second? Is there an 'immunity plus' or 'amnesty plus' option?

Not applicable.

25 Approaching the authorities

What is the best time to approach the authorities when seeking leniency or immunity?

Not applicable.

26 Confidentiality

What confidentiality is afforded to the leniency or immunity applicant and any other cooperating party?

Not applicable.

27 Successful leniency or immunity applicant

What is needed to be a successful leniency or immunity applicant?

Not applicable.

28 Plea bargains

Does the enforcement agency have the authority to enter into a 'plea bargain' or a binding resolution to resolve liability and penalty for alleged cartel activity?

The Antitrust Law provides the defendant with the opportunity to file a proposal for immediate or gradual cessation of the practice or of an adjustment of certain aspects of such practice. Such a proposal may be filed by the defendant at any time prior to the issuance of the final resolution and is subject to approval by the antitrust authorities. According to the CNDC's past opinion, the filing of a proposal does not imply recognition of an illicit activity, and when approved, the defendant will not be sanctioned. However, private damages can still be claimed by private third parties.

It should be noted that the antitrust authorities have recently sustained rather restrictive criteria for approving proposals. The last proposals approved related to practices that had arguably no significant anti-competitive effects. It seems unlikely in this scenario that a proposal relating to a cartel case would be approved by the antitrust authorities.

29 Corporate defendant and employees

What is the effect of leniency or immunity granted to a corporate defendant on its employees?

Not applicable.

30 Cooperation

What guarantee of leniency or immunity exists if a party cooperates?

Not applicable.

31 Dealing with the enforcement agency

What are the practical steps in dealing with the enforcement agency?

Not applicable.

32 Ongoing policy assessments and reviews

Are there any ongoing or proposed leniency and immunity policy assessments or policy reviews?

See question 21.

Update and trends

The most significant development regarding cartel enforcement is the progress of the leniency draft on which the CNDC is currently working. If the leniency programme is enacted by Congress, the prosecution of cartels in Argentina may increase significantly.

In November 2009, the CNDC requested that the judiciary issue an injunctive measure against several large retail chains ordering the cessation of an explicit agreement putting an end to all special promotions and discounts applied to credit-card purchases on certain weekdays. The agreement had been previously announced by representatives of the chains in newspapers.

Defending a case

33 Representation

May counsel represent employees under investigation as well as the corporation? Do individuals require independent legal advice or can counsel represent corporation employees? When should a present or past employee be advised to seek independent legal advice?

There are no restrictions on counsel simultaneously representing both employees and employer corporations. However, it is advisable for present or past employees to seek independent legal advice in case of conflicts of interest, such as claims related to forced involvement in alleged illegal practices.

34 Multiple corporate defendants

May counsel represent multiple corporate defendants?

There are no restrictions specifically applicable to representation of multiple corporate defendants, though this is not frequent in cartel cases.

35 Payment of legal costs

May a corporation pay the legal costs of and penalties imposed on its employees?

To date, the Antitrust Law does not prevent a corporation from paying any legal costs and penalties imposed on its employees, although such payment could be objected to under other legislation (such as corporate or labour law regimes). At the time of writing, no fines have yet been imposed on employees in cartel cases.

The leniency draft discussed in previous questions seems to change the foregoing description as the wording thereof specifically forbids the payment of fines imposed on employees by corporations.

36 Getting the fine down

What is the optimal way in which to get the fine down?

Until a leniency programme is approved, the optimal way to get the fine down is by offering a proposal. However, and as mentioned in question 28, it is unlikely that the CNDC would approve such a proposal in cartel cases.

Another common way to get a fine down is by judicial appeal. Many CNDC fines have been reduced or eliminated by court rulings following appeals at judicial tribunals.

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